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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF NEVADA

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9 Moshe Banner,

Case No. 2:16-cv-01717-RFB-CWH

10 Plaintiff,

11 **ORDER**

v.

12 LAS VEGAS METROPOLITAN POLICE
13 DEPARTMENT, a political subdivision of
14 the State of Nevada and the County of Clark;
15 NAPHCARE, medical care provider for the
16 Clark County Detention Center; LT.
17 GRAHAM, in his individual capacity;
18 DEFENDANT C. DUNN P#8253 in his
19 individual capacity; DOE LICENSED
20 PRACTICAL NURSE; RAY
21 MONTENGRO, NP, individually;
22 KA TRINA SIMEON, RN, individually;
23 DOE DEFENDANTS 1-X, individuals or
24 officers employed at CCDC; and ROE
25 ENTITIES 1-X, inclusive,

26 Defendants.

27 **I. INTRODUCTION**

28 This case is before the Court on Defendants NaphCare, Ray Montengro, N.P., and Katrina Simeon, R.N. (collectively, “NaphCare Defendants”)’ Motion to Dismiss. (ECF No. 17). For the reasons stated below, the Motion to Dismiss is DENIED without prejudice.

29 **II. BACKGROUND**

30 On May 18, 2016, Plaintiff Moshe Banner (“Banner”) filed a Complaint in the Eighth

1 Judicial District Court of Clark County, alleging violations of constitutional and statutory civil
2 rights provisions. (ECF No. 1-1). Specifically, Banner asserts ten causes of action: 1) unlawful
3 arrest in violation of 42 U.S.C. § 1983, against Defendants Graham and Dunn; 2) unlawful
4 imprisonment, in violation of 42 U.S.C. § 1983, against Defendants Graham, Dunn, and Does I-
5 X; 3) due process violation for malicious prosecution, in violation of 42 U.S.C. § 1983, against
6 Defendants Dunn and Graham; 4) deliberate indifference, in violation of 42 U.S.C. § 1983, against
7 all Doe Defendants I-X and Defendants Doe LPN, Montenegro, and Simeon; 5) Monell claims, in
8 violation of 42 U.S.C. § 1983, against Las Vegas Metropolitan Police Department; 6) false arrest,
9 against Defendants Dunn and Graham; 7) intentional infliction of emotional distress, against all
10 Defendants; 8) malicious prosecution, against Defendants Dunn and Graham; 9) false
11 imprisonment, against Defendants Dunn, Graham, and Does I-X; and 10) negligence, against all
12 Defendants. Defendants Las Vegas Metropolitan Police Department (“LVMPD”), Lt. William
13 Graham, and Sergeant Craig Dunn (collectively, “Removing Defendants”) filed a Petition for
14 Removal on July 20, 2016. (ECF No. 1). NaphCare Defendants filed the instant Motion to Dismiss
15 on September 30, 2016. (ECF No. 17). On October 17, 2016, Banner filed a Response to the
16 Motion to Dismiss. (ECF No. 18). NaphCare Defendants Replied on October 27, 2016. (ECF No.
17 20). On May 9, 2017, this Court held a hearing on the Motion to Dismiss. (ECF Nos. 29, 38).

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19 **III. RELEVANT FACTUAL ALLEGATIONS**

20 The following factual allegations are taken from Banner’s original Complaint. (ECF No.
21 1-1). On or about May 19, 2014, Banner was falsely arrested, without a warrant, by Defendants
22 Dunn and Graham for charges of burglary with use of a deadly weapon and robbery with use of a
23 deadly weapon. The Declaration of Arrest and Arrest Report made by Defendant Dunn and
24 authorized by Defendant Graham are entirely devoid of any details supporting probable cause.
25 LVMPD has in place de facto policies of falsely arresting, prosecuting, and imprisoning
26 individuals, and demonstrating deliberate indifference to the safety and medical needs of pretrial
27 detainees with serious medical conditions. Banner was incarcerated upon arrest at Clark County
28 Detention Center (“CCDC”). Eventually, the criminal case which Defendant Dunn filed against

1 Banner was voluntarily dismissed by the Clark County District Attorney on August 7, 2014.

2 During his incarceration, Banner was attacked by other inmates because they believed he
3 was a “snitch.” As a result of the attack, Banner suffered multiple displaced fractures of his jaw.

4 Following the attack, Banner sought medical care from Defendants Doe LPN, Montenegro
5 and Simeon, who were each deliberately indifferent to Banner’s medical needs by claiming that
6 they were not dentists and they could not help him. Montenegro and Simeon denied Banner
7 medical care, which caused him to suffer excruciating pain. Banner was eventually released from
8 jail, and seen by Dr. Mark L. Glyman, M.D., who performed surgery upon Banner’s jaw.

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10 IV. LEGAL STANDARDS

11 **a. Motion to Dismiss**

12 In order to state a claim upon which relief can be granted, a pleading must contain “a short
13 and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P.
14 8(a)(2). In ruling on a motion to dismiss for failure to state a claim, “[a]ll well-pleaded allegations
15 of material fact in the complaint are accepted as true and are construed in the light most favorable
16 to the non-moving party.” Faulkner v. ADT Sec. Servs., Inc., 706 F.3d 1017, 1019 (9th Cir. 2013).
17 To survive a motion to dismiss, a complaint must contain “sufficient factual matter, accepted as
18 true, to state a claim to relief that is plausible on its face,” meaning that the court can reasonably
19 infer “that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678
20 (2009) (citation and internal quotation marks omitted).

21 **b. Nevada Revised Statute § 41A.071**

22 “If an action for professional negligence is filed in the district court, the district court shall
23 dismiss the action, without prejudice, if the action is filed without an affidavit that: 1. Supports the
24 allegations contained in the action; 2. Is submitted by a medical expert who practices or has
25 practiced in an area that is substantially similar to the type of practice engaged in at the time of the
26 alleged professional negligence; 3. Identifies by name, or describes by conduct, each provider of
27 health care who is alleged to be negligent; and 4. Sets forth factually a specific act or acts of alleged
28 negligence separately as to each defendant in simple, concise, and direct terms.”

1 **V. ANALYSIS**

2 NaphCare Defendants argue that, because they are “providers of health care” as defined by
3 Nevada Revised Statute (“NRS”) 41A.017, Banner’s tenth cause of action is one of professional
4 negligence.¹ The Court accepts this argument as to Banner’s state law negligence claim and will
5 construe that claim as one for professional negligence and medical malpractice, as pertains to the
6 NaphCare Defendants. Banner essentially alleges “failure[s] of a provider of health care, in
7 rendering services, to use the reasonable care, skill, or knowledge ordinarily used under similar
8 circumstances by similarly trained and experienced providers of health care.” NRS § 41A.015.

9 NaphCare Defendants further contend that Banner failed to attach the affidavit of a medical
10 expert to his Complaint, and therefore the Court should dismiss the claim without the possibility
11 of amendment, under the plain language of NRS 41A.071, which says the court “shall dismiss the
12 action.” Banner requests leave to amend, and argues that NRS 41A.071’s requirement mandating
13 dismissal without prejudice should be construed as procedural rather than substantive. The Court
14 agrees with Banner, in that the portion of the statute which states that the action shall be dismissed
15 without prejudice, and Nevada law which denies leave to amend, functions mainly as a procedural
16 rule.

17 Where state law claims are brought in federal court based on diversity jurisdiction or
18 pursuant to supplemental jurisdiction, the Court must determine whether to apply state or federal
19 law. See, e.g., Las Vegas Sands, LLC v. Nehme, 632 F.3d 526, 534 (9th Cir. 2011). Under Hanna
20 v. Plumer, 380 U.S. 460, 470-74 (1965), the Court first inquires whether a state law directly
21 collides with federal law. If there is no direct collision, the Court follows Erie and applies state
22 law on substantive issues and federal law on procedural issues. Id. If there is a direct collision,
23 federal law applies. Id. In considering the substantive/procedural distinction, the Court is guided
24 by “the twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable
25 administration of the laws.” Id. at 468.

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¹ NaphCare Defendants also argue that they are “providers of health care” pursuant to NRS
28 41A.009, which is a repealed subsection. As 41A.017 sets forth the definition for “provider of health
care,” the Court will construe the argument according to that subsection only.

1 Under Nevada law, a malpractice complaint filed without the affidavit is a legal nullity and
2 thus may not be amended. Washoe Med. Ctr. v. Second Judicial Dist. Court, 148 P.3d 790, 795
3 (Nev. 2006). The Court finds, however, that the Nevada Supreme Court's procedural
4 determination in Washoe Med. Ctr. that a complaint without an affidavit is legal nullity is a
5 procedural and not a substantive determination to which federal courts do not have to defer. The
6 Nevada Supreme Court recently explained that NRS 41A.071 is procedural: “[T]he NRS 41A.071
7 affidavit requirement is a preliminary procedural rule subject to the notice-pleading standard, and
8 thus, it must be ‘liberally construe[d] . . . in a manner that is consistent with our NRCP 12
9 jurisprudence.’” Zohar v. Zbiegien, 334 P.3d 402, 406 (Nev. 2014) (citation omitted). And,
10 federal courts “freely give leave [to amend] when justice so requires.” Fed. R. Civ. P. 15(a)(2).
11 Leave to amend is to be granted with “extreme liberality.” Morongo Band of Mission Indians v.
12 Rose, 893 F.2d 1074, 1079 (9th Cir. 1990). The Court therefore finds that the state and federal
13 rules here conflict and that the propriety of amendment pursuant to Rule 15 is a procedural matter.
14 Verizon Del., Inc. v. Covad Comm'n Co., 377 F.3d 1081, 1091 (9th Cir. 2004). The Court thus
15 rejects NaphCare Defendants' argument, and will apply Federal Rule of Civil Procedure 15 to
16 allow Banner leave to amend to include the medical affidavit as to his negligence claims. As
17 NaphCase Defendants do not challenge the other claims against them, the Court will conduct no
18 further analysis.

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1 **VI. CONCLUSION**

2 For the reasons stated in this opinion,

3 **IT IS ORDERED** that NaphCare Defendants' Motion to Dismiss (ECF No. 17) is
4 DENIED without prejudice.

5 The Court recognizes that Plaintiff Banner has filed an Amended Complaint (ECF No. 31)
6 with an affidavit which will now be considered the operative Complaint in the case.

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8 DATED: October 23, 2017

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11 **RICHARD F. BOULWARE, II**
12 United States District Judge

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